STATE OF MICHIGAN

COURT OF APPEALS

DEER CREEK HUNT CLUB, INC, and PAJAY, INC,

Plaintiffs-Appellants,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 23, 1997

No. 188949
Berrien Circuit Court
LC No. 94-003192-CZ

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

In this declaratory judgment action, plaintiffs appeal as of right from the trial court's grant of summary disposition in favor of defendant upon finding that no genuine issue of material fact existed, that the suit instituted by plaintiffs' neighbors against plaintiffs did not involve claims covered by defendant's policy of insurance, and that defendant had no duty to indemnify or defend plaintiffs. We reverse in part and affirm in part.

Upon de novo review and consideration of the pleadings and other documentary evidence in a light most favorable to plaintiffs, we find that the trial court erred in granting defendant summary disposition because a genuine issue of material fact existed as to whether plaintiffs expected or intended any bodily injury or property damage regarding the neighbors whose property bordered their hunting club. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire and Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995); *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). If this question of fact were ultimately resolved in plaintiff's favor, plaintiffs would be entitled to coverage under defendant's bodily injury and property damage sections of the policy but not under the personal and advertising injury section.

The initial issue is whether defendant has a duty to defend. "An insurer's duty to defend differs from the duty to provide coverage. It extends even to nonmeritorious claims where those claims allege theories of recovery that fall within the policy. *If there is any doubt regarding whether an allegation*

* Circuit judge, sitting on the Court of Appeals by assignment.

comes within the scope of the policy, that doubt must be resolved in the insured's favor." *American Bumper Mfg v Hartford Fire Ins*, 207 Mich App 60, 66-67; 523 NW2d 841 (1994), aff'd 452 Mich 440; 550 NW2d 475 (1996) (emphasis added; citations omitted). The duties to defend and indemnify are not based solely on the terminology used in the pleadings in the underlying action, i.e., the neighbor's action against plaintiffs. *Fitch, supra* at 471. Rather, the court must focus on the cause of the injury to determine whether coverage exists, not the nomenclature of the underlying claim. *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989); *Fitch, supra*. The inquiry here is twofold: (1) does the claimed injury fall within the meaning of the terms used in the policy; (2) if so, is the cause of the injury covered under the policy. *Fitch, supra*. If coverage is not possible, the insurer is not obligated to offer a defense, which is broader than the duty to indemnify. *Allstate Ins, supra* at 662; *Arco Industries Corp v American Motorists Ins Co (On Remand)*, 215 Mich App 633, 636; 546 NW2d 709 (1996). Because the trial court did not consider the cause of the neighbors' alleged injuries, the court erred in finding "no persuasive evidence" of physical harm or property damage.

The neighbors' complaint in the underlying action alleged that (1) the excessive production and character of the noise created by the voluminous and often continuous discharge of guns is hazardous to the health, safety and welfare of residents and deprived them of the quiet enjoyment of their property, (2) the discharged shotgun pellets cannot be controlled and create a hazard for those near or passing by the club, (3) smoke, fumes, and noxious odor due to the discharge of firearms is unhealthy for adjacent landowners, (4) the club creates an attractive nuisance for children in the area, and (5) the use of plaintiffs' land and increased traffic thereto has significantly diminished the value of the neighbors' property. Under defendant's commercial general liability coverage policy, defendant will provide coverage for bodily injury and property damage caused by an "occurrence" that takes place in the coverage territory and occurs during the policy period. "Bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any one time." "Property damage" includes:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. *Loss of use of tangible property that is not physically injured*. All such loss shall be deemed to occur at the time of the "occurrence" that caused it. [Emphasis added.]

Upon de novo review of the claimed injuries and alleged causes of the injuries, we find that the neighbors' theories of recovery include claims that they suffered bodily injury due to the noise, smoke and odors caused by the activities at plaintiffs' hunting club. The neighbors also allege that plaintiffs damaged their property by interfering with their general enjoyment of their adjacent properties, by diminishing the value of their properties, and by offending their quiet enjoyment.

We recognize, nonetheless, that if the "bodily injury or property damage is expected or intended from the standpoint of the insured," or the injury does not result from an "occurrence," i.e., "an accident[1] [as viewed from the standpoint of the insured], including continuous or repeated exposure to substantially the same general harmful conditions," defendant would have no obligation to provide coverage pursuant to these exclusion provisions contained in plaintiffs' policy. See *Arco Industries Corp v American Motorists Ins Co,* 448 Mich 395, 405, 410; 531 NW2d 168 (1995), on remand 215 Mich App 633; 546 NW2d 709 (1996). Notably, mere knowledge of potential danger does not equal knowledge of actual, intentional, expected harm. *Id.* at 409.

With respect to whether plaintiffs expected or intended the neighbors' injuries, the parties presented conflicting evidence. Plaintiff's owner submitted an affidavit regarding steps taken to prevent plaintiffs' activities from affecting adjoining neighbors, such as hiring an architect to design and construct sound berms to control noise levels, designing set backs, and limiting the starting time for hunting activities on the premises. The record also reflects that at town meetings held prior to the issuance of a special use permit to operate the club, neighbors questioned whether shooting would begin early on Sunday mornings, and one neighbor told plaintiffs' owner that the gunshot blasts vibrated his windows. Plaintiffs' owner also admitted that people in the area did a lot of hunting, so they must have known that there would be noise from the guns.

We recognize that the trial court may not make factual findings or weigh credibility in deciding a motion for summary disposition, and the grant of summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994); *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). Here, the issue of whether plaintiffs expected or intended the bodily injury or property damage to their neighbors hinges on the credibility of plaintiffs' owner and other witnesses, such as the neighbors, whose credibility should be determined by the trier of fact. Where, as here, the truth of a material factual assertion of a moving party depends upon judging the credibility of a witness or party, there exists a genuine issue of material fact and summary disposition should not be granted. *Vanguard, supra*. Accordingly, the grant of summary disposition in favor of defendant is reversed and the case is remanded for further proceedings.

With respect to the issue of coverage under the personal and advertising injury liability section of defendant's policy, however, we find that the trial court properly dismissed this claim. This coverage applies to personal injury caused by "an offense arising out of your business, excluding, advertising, publishing, broadcasting or telecasting done by or for you," and "personal injury" is defined as "[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor," or false arrest, detention or imprisonment, malicious prosecution, slander or libel. This provision is designed to protect the insured when the insured commits the offense of wrongfully evicting, entering or invading the right of private occupancy of a premises when that premises is occupied by or on behalf of the owner, landlord or lessor of the premises. Upon de novo review, we find that there is no genuine issue of material fact with respect to coverage under this section of the policy, and defendant is entitled to

judgment as a matter of law because the personal and advertising injury liability policy does not apply to the neighbors' claims.

Accordingly, summary disposition is precluded because a genuine issue of material fact exists regarding whether plaintiffs expected or intended any injury or damage to occur to their neighbors through plaintiffs' operation of the hunt club. Because the neighbors' allegations fall within the theories of bodily injury and property damage as defined in defendant's insurance policy, defendant had the duty to defend plaintiffs in the underlying action. Once the issue of material fact is resolved, the duty to defend may be eliminated because the insurer owes the duty to defend until the insurer has confined the claims against the insured to those theories that the policy would not cover. *American Bumper Mfg, supra*. at 66-67. Thus, defendant was not entitled to judgment as a matter of law except with respect to the finding that defendant's policy did not provide coverage pursuant to the personal and advertising liability provisions.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. No taxable costs pursuant to MCR 7.219 because neither party prevailed in full.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot

[1] Although "accident" is not defined in defendant's policy, the commonly used meaning is "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Arco Industries, supra*, 448 Mich 404-405.